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No. 1056

Supreme Court of the United States

(OCTOBER TERM, A.D. 1945)

LEO H. STEELE,
Petitioner,
VERSUS
GENERAL MILLS, INC.,
Respondent.

OPPOSING BRIEF OF GENERAL MILLS, INC., TO THE PETITION AND BRIEF OF LEO H. STEELE FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND TO THE BRIEF AMICUS CURIAE BY THE ATTORNEY GENERAL OF THE STATE OF TEXAS IN SUPPORT THEREOF

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OPPOSING BRIEF OF GENERAL MILLS, INC., TO THE PETITION AND BRIEF OF LEO H. STEELE FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND TO THE BRIEF AMICUS CURIAE BY THE ATTORNEY GENERAL OF THE STATE OF TEXAS IN SUPPORT THEREOF

To the Honorable, the Justices of the Supreme Court of the United States:

Substantially the same questions are presented in the application and brief of petitioner and in the *amicus curiæ* brief of the Attorney General of Texas. Substantially the same arguments were presented to the Circuit Court of Appeals and rejected by that Court. It is respondent's view that this case involves purely a private controversy; not one in which the State of Texas, through its Attorney General, has any legitimate interest; that no question of public interest or public policy is involved; and that the

judgment of the Circuit Court of Appeals is correct. The recovery afforded petitioner in the trial court inured to him alone, not to the State of Texas. Petitioner, and not the State of Texas, benefits if such recovery is sustained. Separate replies to the petitioner's application and brief and to the brief of the Attorney General of Texas would be duplicitous. We therefore take this opportunity of presenting a joint reply to both.

I. PRELIMINARY STATEMENT

The facts involved, to the extent necessary to the determination of the cause on the basis it was disposed of by the Circuit Court of Appeals, are stated in the opinion of that Court. We deem it appropriate, however, to briefly state the following additional facts:

In the year 1940 and for some time prior thereto the petitioner Steele was an employee of respondent, General Mills, Inc., in charge of the transportation by truck of certain products of respondent from its Oklahoma City plant, where petitioner was stationed. Respondent entered into a contract with an independent contractor at its Oklahoma City plant to haul a certain class of its products from the plant direct to its customers instead of making such deliveries direct in trucks of respondent, as had previously been the custom. The new transportation arrangement at Oklahoma City was on a cost plus basis; that is, the contractor received his costs, plus 10% as compensation for hauling and delivering the products. Respondent thought it desirable to make a similar arrange-

ment at Wichita Falls and tentative plans were worked out with petitioner whereby he would leave the employ of respondent, move to Wichita Falls and enter into a transportation arrangement similar to the arrangement then in effect at Oklahoma City. Preparatory to putting the agreement into effect, petitioner did move to Wichita Falls, Texas, and for a time superintended the transportation and delivery by truck of the products of respondent from its Wichita Falls plant. While petitioner was at Wichita Falls, and prior to the commencement of the arrangement here involved, respondent forwarded to him a contract to be executed similar to the contract in effect at Oklahoma City, expressly providing that petitioner would be paid for his services the actual cost thereof, plus 10% and plus some additional administrative charges. It was also contemplated that respondent would sell petitioner the trucks then in use by it and these trucks, suitably adapted for that purpose, would be used by petitioner in transporting respondent's products. Petitioner thereupon submitted the proposed contract to his attorneys in Fort Worth (the same attorneys now representing him in this litigation) and Mr. Morgan, one of his attorneys, wrote him on February 28, 1941, as follows (R. 188):

"Dear Mr. Steele:

"Since you left this morning, I have again carefully considered the proposed contract to be entered into between you and General Mills.

"Paragraphs 13, 14, 15, 16 and 17, which are set forth on pages 4 to 7, are in direct conflict with the statutes of the State of Texas and therefore they

must be eliminated from the contract. In lieu thereof the following paragraph should be inserted:

"'It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission.'

"Therefore, we recommend that your contract be rewritten whereby you delete the paragraphs above listed and insert in lieu of the above.

"Very truly yours,
"(Sgd.) CECIL A. MORGAN.

"Mr. Steele:

"P. S. A custom has long prevailed in this state that contract carriers must carry such provision as outlined in the letter to which this is attached relating to rates and charges. Then after the contract carrier certificate has been issued the contract carrier and shipper work out their own arrangements. Therefore there is very little for your company to be concerned about regarding this change.

"Very truly yours,
"(Sgd.) CECIL A. MORGAN.

"Special delivery."

A copy of this letter was delivered to Mr. Colfix, the division comptroller of respondent, at Oklahoma City. After correspondence between the parties, Mr. Christopher, a member of the firm representing petitioner, wrote Mr.

Colfix, of respondent, quoting Section 6aa of Article 911b, Texas Civil Statutes, and concluded his letter with the following statement:

> "I believe this fully answers your question, but if there are other questions we shall be pleased to answer them, and further than that I might make some valuable suggestions to Mr. Steele or yourself with reference to this matter the next time Mr. Steele is in the office."

A conference was arranged in the early part of April, 1941, at which time there were present Colfix, petitioner, and Mr. Christopher, one of the attorneys for petitioner. Colfix, at the trial of the case, testified without contradiction as follows (R. 198):

> "I indicated to these gentlemen that the form of contract that they proposed to us was entirely different than the understanding that Mr. Steele and our company had as to the financial arrangements for compensation, and I attempted to determine from them whether or not this contract was first, legal, and second, whether or not it would make possible the type of financial arrangement that we wished, and they assured me, first, that in order to get a permit it was necessary to put in the standard clause and that the Railroad Commission had never prescribed rates for this type of service, and it was their opinion that such rates would never be prescribed; that we could go ahead and make this form of contract and then before we started our operations that we could legally execute a supplemental contract for the type of service that would be rendered by Steele for us.
>
> "I indicated to these gentlemen that our company

had a great deal of confidence in Mr. Steele, and that we never expected to have any difficulty with Mr. Steele in this type of contract, but I did wonder if there was any possibility that some later Court ruling or interpretation being made that the Railroad Rates could apply to the contract that we had, and they informed me again that the contract was a legal contract, that it was an agreement between two parties and that the Railroad rates for common carriers would not apply to our operation and that we would have nothing to worry about.

"Mr. McKnight: You say the contract was a legal contract; to what contract do you refer?

"A. I refer to the original contract as suggested by them, supported with a supplemental contract for charges. You see the original contract had not basis for charges under the theory that the Railroad Rates did not apply, and we must have charges, between individuals.

"Q. And that was what you expected to put in your supplemental contract, the agreement with respect to rates?

"A. That is correct.

"Q. That was to what your conversation was directed?

"A. That's correct."

And further (R. 264):

"Q. All right, I will ask you this question, Mr. Colfix, in this conversation you had with Mr. Christopher and Mr. Steele, in the office of Mr. Christopher in Ft. Worth on April 11, 1941, I believe it was, according to the date of this letter, was there any suggestion

made by Mr. Christopher at that meeting that this supplemental contract be submitted to the Railroad Commission?

"A. No, no such suggestion was made."

Neither petitioner nor his attorney, Mr. Christopher, testified at the trial of the case, though both were present. The testimony of the witness, Colfix, is undisputed.

Following this conference Mr. Christopher wrote and forwarded to Colfix the following letter (R. 200):

"This is in reference to and confirms our conversation of this morning while you and Mr. Steele were in the office. It will also supplement our letter to you of April 3rd.

"It is absolutely necessary so far as obtaining the grant of the contract carrier permit is concerned that the contract between General Mills and Mr. Steele recite that the charges to be made will be such charges as have been prescribed by the Railroad Commission of Texas, that being under the provisions of the statute of, as quoted to you in my letter of April 3rd, copy of which is also enclosed herewith.

"In my letter to you of April 3rd, I pointed out the fact that the Railroad Commission has attempted to prescribe rates for contract carriers, that being contained in Railroad Commission of Texas Tariff Circular No. 2-A, which fixes a minimum rate for contract carriers only, at the rates prescribed for common carriers.

"You will especially observe the language of the statute which contains the following language:

" 'The Commission shall prescribe minimum rates, fares and charges to be collected by such con-

tract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.'

"Of course, you have not had any experience with the service of contract carriers, but you do anticipate that the service to be rendered under the contract which you propose to make will not be a serivce which will be in any respect 'substantially the same service' as is rendered by common carriers, for the simple reason that this contract carrier, if you enter into a contract and if the permit is approved, will devote all of its time and attention to you exclusively and to no other member of the general public. The trucks which he operates will be dedicated to your service alone and will not operate in the service of any other member of the general public. He will be subject to your direction and command at all times the same as his trucks will be and will have no regular schedules and no regular routes as common carriers must have, his trucks will be ready to operate from Wichita Falls or from other points at any hour of the day or night which you may direct in order to render the service which you require and will operate over most direct routes to any destination to which your commodity will move without awaiting scheduled departure times and without the interlining of the shipments at connecting carrier points, as well as many other services which cannot at all be rendered by common carriers.

"It may not, therefore, be said that the service which will be rendered by this contract carrier can never in any event be a substantially similar service to that rendered by common carriers.

"The Railroad Commission of Texas, in the almost ten years now since the Truck Law was passed as it now exists has not at any time undertaken an investi-

gation of the services rendered by contract carriers nor have they undertaken any investigation of the cost of such service or any of the other factors which would enter into rate making. Of course, you do not know about these costs or advantages either, because you have not operated with the benefit of a contract carrier. Just what operating cost would be and what particular advantages will be worth then as may be anticipated cannot now be determined by you without some experience.

"It is my thought on this matter that it should be entirely agreeable with you to make the contract as is proposed by Mr. Steele now in your possession, and that thereafter and after the contract carrier permit is granted, if it is granted, and after you have had some experience with the operation that it is going to be necessary and entirely proper under the law that some supplemental contract be entered into based upon the service rendered. That such an arrangement will not be violative of the provision of the statute quoted in my letter of April 3rd, for the very simple reason that the two services, that is, contract and common carrier service, cannot be compared so that it can never be said that the two services rendered could be 'substantially the same.'

"We have given considerable thought to various other elements entering into consideration of whether or not you should make this contract as suggested by yourself this morning, that is various contingencies that might arise following the execution of the contract and the institution of the operation. We think, however, that you fully understood our position with reference to those matters and I do not believe that any complication could possibly arise on account of any of those things, and since it is my impression that you wished our opinion with reference to the

particular section of the statute involved along we do not assume that it is necessary for us to discuss those matters.

"Personally I do not believe that there will be any element of violation of the law involved if subsequently some additional contract is entered into supplemental to the original contract adjusting the rates based upon experience and the service actually rendered in comparison to service of common carriers. To me, however, it is simply a reasonable business risk, if it is a risk, which you can afford to take.

"Very truly yours,

"tsc/ds "T. S. CHRISTOPHER."

Following receipt of this letter, one of the attorneys for respondent in Oklahoma City conferred with petitioner's attorney over the telephone and thereafter an amendment was made to paragraph 13 as proposed by petitioner's attorneys so as to add the following phrase:

"For the kind and character of service to be rendered hereunder." (R. 203).

This language is found in the contract as executed (R. 116-122). Thereafter Colfix wrote Mr. Christopher a letter of date April 17, 1941, as follows (R. 204):

"Yesterday you discussed with Mr. France a change in paragraph 13 of the contract between Mr. Steele and General Mills. As a result of this conversation you both agreed to add the following phrase to the end of Paragraph 13, 'for the kind and character of service to be rendered hereunder.' We have made this change and have executed two copies of the contract which are being sent to you at this time.

"After full consideration of the matter our attorneys are of the opinion that it is quite in order for us to make this type of contract and later have a supplemental agreement for costs as may be agreed upon between Mr. Steele and General Mills.

"I did not indicate the date of execution on Page 1 and page 5, as I thought it might make some difference as to whether or not the present date was indicated or whether you wanted to go back to the time you started your hearings with Railroad and Warehouse Commission. Will you please investigate this date and advise me in order that I might place it on my copy."

The date, August 26, 1940, was inserted in the contract, although it was not actually agreed upon and executed until about April 17, 1941 (R. 206). Following the letter to Mr. Christopher last referred to, a supplemental agreement was drawn up and agreed to between the parties (R. 206) and is found in the Record at page 208. It was delivered to petitioner Steele personally at Oklahoma City or mailed to him at Wichita Falls. He executed the agreement and returned it to Colfix. The supplemental agreement is dated July 31, 1941, and amends Paragraph 13 of the original agreement. Although the tariff relied upon by petitioner was in effect at the time, it is recited in the supplemental agreement that the Railroad Commission of Texas had not fixed any "rates, charges or tariffs for the kind and character of services to be rendered under said contract" and the parties thereupon set forth the amount of compensation to be paid petitioner by respondent. This compensation generally was based upon petitioner's costs, plus 10%, plus certain administrative charges, and evi-

denced the real agreement between the parties from the inception of the negotiations. No transportation services were performed by petitioner until after the execution of the supplemental agreement. It was in full effect during all the times involved. Petitioner's operations started on August 1, 1941, and continued through October 31, 1943, a period of twenty-seven months. Each month petitioner billed respondent for services strictly in accordance with the terms of the supplemental agreement and was paid on that basis currently (R. 214-217). In this connection the witness, Colfix, testified, without contradiction (R. 217):

> "Q. Now, during the entire period of this operation, before its termination, some twenty-seven months after it started, did Mr. Steele ever make any claim to you that he was entitled to be paid on the basis of the Railroad Commission's tariff rates?
>
> "A. No, sir.
>
> "Q. Was there any such claim as that ever presented to you until after the termination of this agreement?
>
> "A. None."

Petitioner filed, on or about August 26, 1940, with the Railroad Commission of Texas, an application for a contract carrier permit to haul exclusively for General Mills. This application contains a statement that the rates to be charged would be those promulgated by the Railroad Commission of Texas (R. 70). This was long before the actual agreement was entered into.

Respondent was not a party to this application and knew nothing of its contents (R. 190). The order of the Railroad Commission granting in part and denying in part the permit was entered June 16, 1941 (R. 125) and the permit itself is dated July 9, 1941 (R. 130). It was definitely agreed by the parties and believed by respondent, that the Railroad Commission had not fixed rates, charges or tariffs for the character of services to be performed by petitioner under the contract here involved, and it was therefore necessary to provide for the amount to be charged and paid for the services to be rendered. Hence the supplemental agreement of July 31, 1941. [Testimony of Colfix (R. 325).]

II. ISSUES BEFORE THE TRIAL COURT

The assertion is made in petitioner's brief that "the point on which the Circuit Court of Appeals reversed and rendered judgment was not even raised in the trial court." (page 26). Similar statements are also elsewhere made in the brief. Numerous defenses were presented by respondent in the trial court which are succinctly stated in the opinion of the Circuit Court of Appeals. The exact point upon which the Circuit Court of Appeals disposed of the case was presented to the trial court. Reference is here made to Paragraphs 14 and 15 of respondent's trial answer (R. 63-66). At the conclusion of the evidence respondent presented to the trial court a motion for an instructed verdict, urging as a ground therefor the very point upon which the Circuit Court of Appeals decided the case [see Paragraphs 7 and 8, respondent's motion

for an instructed verdict (R. 359-360).] It is apparent that the statements made by counsel for petitioner are obviously incorrect.

In addition to the point upon which the Circuit Court of Appeals decided this cause, respondent presented, among others, the following substantial defenses in the trial court, which were brought forward as Specifications of Error in the Circuit Court of Appeals:

(1) The evidence failed to disclose that the Railroad Commission tariffs relied upon by petitioner were applicable to the transportation services performed by petitioner, this because the evidence disclosed and the jury found that the operations of petitioner were not in competition with those of common carriers and that the services performed by petitioner were not substantially the same as those performed by common carriers.

(2) The order of the Commission granting petitioner a permit and the permit itself, if construed as an order applying the Commission tariffs to the transportation to be performed by petitioner were to that extent void upon their face because the Commission failed to find the facts requisite to authorize it to fix rates for the services involved. The lawmaking body of Texas delegated only special and conditional power to the Commission to fix rates for contract carriers. Before that power may be exercised it must affirmatively appear and the Commission must find that the operations of the contract carrier over the highways of Texas are in competition with common carriers and then the minimum rates prescribed shall not

be less than the rates prescribed for common carriers for substantially the same service. The Commission failed to find the requisite facts authorizing it to fix rates and such facts did not appear in the record.

(3) The evidence disclosed and the jury in the trial court found that the operations of petitioner over the highways of Texas were not in competition with the operations of common carriers and that the services performed by him were not substantially the same as services performed by common carriers. Hence the basis for any attempted acts of the Railroad Commission to fix rates failed.

(4) Petitioner was essentially a private carrier hauling exclusively for respondent under a private contract of carriage. His services were not substantially the same as those of a common carrier nor did he operate in competition with common carriers. There was, therefore, no such public interest involved as would justify the State to assume jurisdiction over the compensation paid by respondent to petitioner. Such compensation had no reasonable relation to the safety of the highways nor could it adversely affect common carriers. If, in fact, the Legislature of Texas did confer power upon the Commission to fix the compensation to be charged by petitioner to respondent, and if, in fact, the Commission undertook to exercise such power and fix such compensation or rates to be charged, then the statute of the State of Texas, to the extent stated, and the acts of the Commission thereunder, deprived respondent of its property without due process of law and interfered with its freedom of contract in violation of the

Fifth and Fourteenth Amendments to the Constitution of the United States.

Only two issues were presented in the trial court upon which there were conflicting facts. These issues were whether petitioner's operations were in competition with common carriers over the highways of Texas and whether the services performed by him were substantially the same services as those rendered by common carriers. Petitioner insisted upon the affirmative of both these issues; respondent the negative. The evidence relating to all other issues in the case was undisputed. The trial court submitted to the jury these two issues of fact upon which there was conflicting evidence. The jury resolved both issues by special verdict in favor of respondent. The special verdict was supported by competent evidence. The trial court did not set it aside but thereafter rendered judgment in favor of petitioner, notwithstanding the special verdict.

All of the above-mentioned points, as well as the point upon which the Circuit Court of Appeals decided this case, were strenuously pressed by respondent in the court below. It was and is the position of respondent that it is entitled to judgment on its motion for an instructed verdict and also on the special verdict of the jury. The Circuit Court of Appeals, without discussing the merits of the points specifically enumerated above, disposed of them in this language:

"We will not enter into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier without first determining whether or not it was in competition with, and performing services substantially similar to, a common carrier, nor the related question as to whether Section 6-aa, without making same applicable to contract carriers in competition with common carriers, is unconstitutional and void, for we agree with Appellee that the supplemental contract to pay rates less than those provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him."

It is the contention of respondent that the questions referred to by the Circuit Court as not being discussed, but which were in issue in the case, present additional grounds for sustaining its judgment. Respondent is entitled to now advance those additional grounds which sustain the judgment of the Circuit Court and demonstrate its correctness, even though the opinion of the Circuit Court be construed as in effect deciding those points adversely to respondent.

—*Story Parchment Company* v. *Patterson Parchment Paper Company*, 282 U. S. 555, 75 L. Ed. 544.

Hereinafter under Section IV of this brief those additional grounds urged by respondent not adopted, and by inference rejected by the Circuit Court, as a basis for its judgment will be presented.

III. BRIEF OF ARGUMENT

Points of Reply to the Brief and Argument in Support of the Petition for Writ of Certiorari:

1.

The Circuit Court of Appeals correctly held that petitioner had no contractual cause of action, and the Court in so deciding did not go outside the issues or facts.

2.

The Circuit Court of Appeals correctly held petitioner to be without a statutory cause of action to recover the rates allegedly fixed by the Railroad Commission of Texas.

3.

The Circuit Court of Appeals correctly held that petitioner could not under the statute nor under the common law recover compensation in excess of the contractual compensation paid to and received by him in settlement of the services rendered.

4.

The Circuit Court of Appeals correctly held that the public policy of Texas did not require that petitioner be awarded a recovery in this case.

A. First Reply Point

The Circuit Court of Appeals correctly held that Petitioner had no contractual cause of action, and the Court in so deciding did not go outside the issues or facts.

Petitioner, as plaintiff in the District Court, brought suit upon the contract dated August 26, 1940, and attached the same as Exhibit "A" to his First Amended Complaint (R. 3). No reference was made to the supplemental agreement of July 31, 1941. In Paragraph V of the Complaint, Petitioner pleaded a right to recover in the alternative, either upon the alleged rates prescribed by the Railroad Commission or upon the contract.

Respondent, as defendant below, by paragraphs 14 and 15 of its First Amended Answer (R. 54) specifically pleaded that the contract sued upon did not constitute the entire agreement and that the supplemental agreement of July 31, 1941, was a part and parcel of the full contract of the parties. In detail the answer alleged the circumstances of the execution of the two agreements as constituting the contract of the parties.

Upon trial, evidence was introduced at length establishing beyond any question that the contract of the parties was evidenced by the two agreements and was intended to be so constituted from the outset (R. 184-213). In fact it was petitioner and his counsel who suggested and caused the agreement to be evidenced by the two agreements instead of one. [See the correspondence, Defendant's Exhibits 1 to 5 (R. 188-200) and the opinion of the Circuit

Court.] There was no denial or dispute of the evidence introduced upon this point. Neither petitioner nor counsel testified.

Thus, the repeated assertions in the brief of petitioner that the point decided by the Circuit Court that the *contract* of the parties was in fact constituted by *two* separate documents, was not an issue in the case and that the Circuit Court decided a point upon facts not in issue (brief of petitioner, p. 25), or not raised in the trial court (brief of petitioner, p. 26), are utterly unfounded.

The cases cited (brief of petitioner, pp. 26, 27) to support the contention that the Circuit Court was without jurisdiction or authority to determine this point are not applicable or pertinent.

Seely Oil & Gas Co. v. *R. R. C.*, 128 Fed. (2d) 334, (C. C. A. 5) was a suit in equity in which the trial court had failed and refused to make findings of fact as required by Rule 52, Rules of Civil Procedure. The Circuit Court simply held it was entitled to those findings by the trial court and refused to determine the facts or the case on its merits without such findings.

Cities Service Oil Co. v. *Dunlop*, 84 L. Ed. 196, 308 U. S. 209, states the rule that federal courts will follow local rules of property law.

Union Bleachery v. *U. S.*, 79 Fed. (2d) 549; *North American Accident Ins. Co.* v. *Anderson*, 100 Fed. (2d) 452, and *McGee* v. *Nee*, 113 Fed. (2d) 543, state the rule that in jury waived cases the Circuit Courts will not substi-

tute their conclusions upon the facts for those of the trial court unless the trial court's conclusions are clearly erroneous or not supported by substantial evidence.

Here the Circuit Court merely held that as a matter of law under the undisputed evidence, the contract of the parties was evidenced and constituted by the *two agreements*, and not one.

—10 Tex. Jur., p. 286, sec. 166.

Petitioner next asserts that the supplemental agreement was void as against public policy and thus he should be permitted to ignore that part of the contract and sue alone upon the original agreement. The vice of this argument is forcibly pointed out in the opinion of the Circuit Court of Appeals. That Court held from the undisputed evidence that there was but one contract that spoke the actual intent of the parties as to the compensation to be paid to petitioner, and that such intent was evidenced by the supplemental agreement under which all the services were performed; that the provisions of the supplemental agreement were a part and parcel of the *only contract existing between the parties*. The Court below also correctly held that a contract modified before performance, takes the place of the original contract and that all services in the case at bar were performed under the contract as constituted by the supplemental agreement. The evidence conclusively shows that at the very time the original contract was executed it was contemplated that a supplemental agreement would be entered into for the purpose

of amending the compensation provisions of the original contract before any services were performed thereunder. That is exactly what was done.

Furthermore, Section 13 of the original contract (the covenant relied upon) only required respondent to pay rates promulgated by the Railroad Commission "for the kind and character of services to be rendered hereunder" (R. 121). The evidence shows that Tariff 1-A of the Railroad Commission, sought here to be applied, *did not cover the kind and character of services rendered by petitioner,* since such services so rendered were not substantially the same services as those rendered by common carriers. The tariff itself described services dissimilar in many respects. The parties to the modified contract (entered into subsequent to the order of the Commission which petitioner now asserts applied the general tariff to the services here involved) expressly stipulated:

> "It is mutually understood and agreed that the Railroad Commission of Texas has not fixed any rates, charges or tariffs, and has not promulgated any rules and regulations respecting, for the kind and character of service to be rendered hereunder, * * *."

Under the stipulation of the parties and the evidence, no claim can be asserted under the covenant of the original contract *because the very standard fixed for determining the compensation to be paid thereunder failed.*

> —*Canadian National Ry. Co.* v. *George M. Jones Co.*, 27 Fed. (2d) 240, 242.

Even if the Railroad Commission tariffs did fix rates

for the kind and character of services here involved and the orders of the Commission made such tariffs applicable to the services rendered under the contract, it does not follow that the modified contract was void. Under Section 6-aa of the Texas Motor Carrier Act, Article 911-b, Texas Revised Civil Statutes, the Commission is *empowered to fix minimum rates for contract carriers operating in competition with common carriers.* Such contract carriers may charge any rate they wish and can agree upon with the shipper, which exceeds the minimum. The compensation specified in the modified contract might or might not exceed the minimum rates here relied upon, dependent upon costs, which included depreciation on equipment, damage claims and losses (absorbed by respondent), administration charges, and many other elements. It is quite conceivable that the compensation required to be paid petitioner could have exceeded the minimum rates relied upon. The modified contract was therefore not void. *Wright* v. *Donaubauer,* 154 S. W. (2d) 637; *Great Atlantic & Pacific Tea Co. v. Warren,* 44 S. W. (2d) 510. It required actual experience to determine if the compensation required to be and actually paid was less than the alleged minimum requirements of the Commission. It is clear that petitioner cannot here recover under the covenants contained in the contract.

But if the contract were void, it could not be segregated as to lawful and unlawful portions, the invalidity permeated the entire transaction and petitioner, the "prime

offender," being in *pari delicto* could not and should not recover under the contract which was fully executed long before suit was brought.

—*Wright* v. *Wight & Wight*, 229 S. W. 881.

In 10 Tex. Jur., p. 242, Sec. 140, it is stated:

> "Where an illegal contract has been fully executed, the courts will not interfere to litigate the claims of parties in *pari delicto* who have been injured thereby; neither a court of law nor a court of equity will aid either party to recover or reinvest himself with any title or interest vested in the other, but will leave them in the same position as to vested interests as they, by their own acts, have placed themselves. So money paid under an illegal contract may not be recovered back, where the contract has been fully executed and the parties are in *pari delicto*."

We respectfully submit that upon this point a simple question of law, having no importance to the public welfare or interest, was correctly decided, to-wit: That petitioner had no right to recover under the contract.

B. Reply Points Two, Three and Four Presented Together

2.

The Circuit Court of Appeals correctly held petitioner to be without a statutory cause of action to recover the rates allegedly fixed by the Railroad Commission of Texas.

3.

The Circuit Court of Appeals correctly held that petitioner could not under the statute, nor under the common law recover compensation in excess of the contractual compensation paid to and received by him in settlement of the services rendered.

4.

The Circuit Court of Appeals correctly held that the public policy of Texas did not require that petitioner be awarded a recovery in this case.

As pointed out by the Circuit Court of Appeals, petitioner was not content to stand solely upon his alleged contract. He claimed a right of recovery under the Texas statute and now also contends that he has a common law right to recover the rates and charges allegedly fixed by the Railroad Commission.

The underlying basis of the argument of petitioner and of the Attorney General is that public policy demands a recovery be allowed petitioner (not the State of Texas) in order to carry out the announced purpose of the Texas Motor Carrier Act (Art. 911b, *supra*), notwithstanding the absence of a provision in that Act affording a cause of action to contract carriers such as petitioner, to recover the alleged rates prescribed by the Commission, and not-

withstanding the absence of a provision in that Act making it the absolute duty of such contract carrier to collect such rates.

In brief, the stated purposes for the enactment of the Texas Motor Carrier Act are: (1) To preserve the highways of the State; (2) to protect the traveling public from injuries resulting from unrestricted use of the highways for business purposes; and (3) to eliminate discrimination in rates charged (Sec. 22b of the Act, *supra*).

While not specifically stated in the enactment itself, it is clear that another controlling purpose of the Act was to protect common carriers from unfair competition of contract carriers operating in competition with common carriers and performing substantially similar services (see the opinion of Circuit Court of Appeals in this case and the opinion of this Court in *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. Ed. 288).

Respondent has at no time asserted the invalidity of of Texas Motor Carrier Act if properly construed. The decision by the Circuit Court in no manner adversely affects that Act. It is conceded that the State of Texas has constitutional authority to regulate and control, in any reasonable manner, motor transportation over the highways of that State. *Stephenson* v. *Binford*, *supra*, determined that question in 1932.

In the case at bar no contention has been made that the transportation services performed by petitioner created any undue burden upon the highways of the State or injuriously affected the use thereof by others. In fact, the Commission, in granting the permit, found to the contrary

and the evidence shows that all of the regulatory safety measures were made applicable to the services rendered. There is no claim that such regulatory measures were not observed.

Common carriers were not adversely affected in any respect by the transportation services rendered by petitioner or the charges made therefor. The evidence is undisputed that not one pound of tonnage was diverted from common carriers through the operations of petitioner. On the other hand, the evidence is conclusive that the class of commodities previously shipped by respondent over common carrier lines continued to be shipped over common carrier lines throughout the period of Steele's operations. [See the testimony of the witness, Frank Cross (R. 268 to 280), which disclosed in detail the facts as to the transportation of the products of respondent over a comprehensive period of fifty-four months, in relation to transportation by common carriers. This evidence was not disputed and conclusively established that the operations of petitioner did not adversely affect the business of any common carrier.] The jury found and the evidence showed that Steele did not operate in competition with common carriers over the highways of the State and that the services performed by him were not substantially the same as the services performed by common carriers. These findings were not set aside by the trial court but were allowed to stand (R. 104). The class of commodities handled and delivered by Steele was previously handled and delivered by respondent in its own trucks operated by its own drivers. During the Steele operation such commodities

were handled and delivered in the same trucks (sold by respondent to petitioner), and operated substantially by the same drivers, with the only difference being that previously the trucks were the property of respondent and the drivers its employees. Manifestly, the interest of common carriers was not adversely affected by the operation. In any event, they are not here complaining in any respect of the operations or the prices charged and received.

There was no discrimination in rates charged because, as stated by the Circuit Court of Appeals:

> "A contract carrier who hauls for only one customer cannot be guilty of discrimination in the matter of rates. He has no other customers in whose favor he could discriminate."

Petitioner was not a contract carrier hauling for numerous contractees or the public at large. He hauled only for General Mills and the permit under which he operated restrained him from hauling for others.

Moreover, it may be noted that as to the *contract motor carrier*, the prevention of discriminatory rates, in so far as the public is concerned, *was not intended or provided for*. The statute only provides that in cases where it is proper for the Railroad Commission to prescribe rates (i. e., for contract carriers in competition with common carriers), the Commission shall prescribe minimum rates which shall not be *less* than the rates prescribed for common carriers for substantially the same service.

This Court had occasion in *Stephenson* v. *Binford*,

supra, to note this fact. Speaking of the authority of the Railroad Commission to prescribe rates, it was there said:

> "*The authority is limited to the fixing of minimum rates.* The contract carrier may not charge *less* than the rates so fixed, *but is left free to charge as much more as he sees fit and can obtain.*" (p. 274, official report) (Emphasis ours).

A contract motor carrier in Texas, operating in competition with common carriers and under a prescribed minimum rate schedule, may discriminate at will among his customers so long as he does not adversely affect the common carrier by charging *less* than the prescribed rates.

Such discrimination could not be exercised by common carriers and the common carrier cases cited in support of requiring recovery because public policy denounces discrimination in rates, are not applicable here. The difference in policy between contract and common carriers is further illustrated by the fact that the contract carrier is not required by the law to file a copy of his contract of carriage nor is he required to file a schedule of rates as the common carrier is required to do. [Sec. 10 (3), Art. 911b, *supra*.]

In these vital respects the Texas Act differs from the federal enactment and the enactments of some other states from which authorities have been cited by petitioner and the Attorney General of Texas. In fact, the only regulation with respect to rates charged by contract carriers is found in Section 6aa of the Act (Article 911b, *supra*), wherein the Commission is vested with power to prescribe minimum rates for contract carriers *operating in competi-*

tion with common carriers, which minimum rates *shall not be less* than rates prescribed for *common carriers performing substantially the same service.* No finding was made by the Commission that the operations of Steele were or would be in competition with common carriers or that the services to be performed by him were substantially the same services as those performed by common carriers. The facts found by the Commission in its order are to the contrary. By evidence and express findings of the jury, both of these essential elements are here lacking.

It is inconceivable that the interest of the public is here involved. If there has been a violation of the Act, the remedies specifically given the State by the Act itself are amply sufficient to prevent recurring or future violations.

On the other hand, the Act discloses that the State is concerned in the rates charged by common carriers by motor, the same as it is concerned in the rates of common carriers by rail. Section 10 (3) of the Act requires a common carrier by motor to file with its application for a certificate of public convenience and necessity "a proposed schedule of service and a schedule of rates to be charged between the several points or localities to be served." No similar requirement is made of contract carriers. There is no regulation of the Commission requiring any such schedule to be filed. It is true the Circuit Court of Appeals said it was appropriate and perhaps requisite that an applicant for a permit should exhibit his contract of carriage

under which he proposed to operate. The Court evidently prefaced this remark upon statements made in certain letters of petitioner's attorneys preceding the execution of the written agreements wherein statements are made that a custom prevailed that a contract carrier must submit his contract to the Commission showing the rates to be charged shall be such rates as prescribed by the Commission, but the law itself makes no such requirement.

Section 6a of the Act specifies in great detail the information necessary to be set forth in an application by a contract carrier for a permit. There is no requirement that a schedule of rates be filed or exhibited. There is no evidence of any regulation of the Commission to this effect. Certainly a prevailing custom or an unwritten requirement of the Commission in this respect could not act as a substitute for an enactment of the Legislature nor control the public policy of the State. The public policy of the State is defined by its authorized law-making body, not by custom or by an unauthorized requirement of a subordinate administrative board.

Regardless of the name designated, petitioner was nothing more than a private carrier hauling and performing services exclusively for respondent. Neither the public nor any other potential customer was entitled to demand his services. Common carriers were not interested in or prejudiced by the services performed by him because his operations were not in competition with or similar to the services performed by common carriers, and diverted no tonnage from such common carriers.

It therefore appears from an analysis of the evidence and of the law itself that this case differs in vital and material respects from the common carrier and contract carrier cases relied upon by petitioner. The case most strenuously stressed by both petitioner and the Attorney General of Texas is that of *Papetti* v. *Alicandro*, 58 N. E. (2d) 155 (Supreme Judicial District Court of Massachusetts).

An analysis of that case, however, clearly discloses distinguishing facts upon material and essential elements not present in the case at bar. The carrier there involved was operating part of the time in question as a contract carrier and part of the time as both a contract and common carrier. The carrier was required to and did file with the Department of Public Utilities a schedule or tariff of rates which were kept open for public inspection. Apparently the only essential difference between contract and common motor carriers in Massachusetts is that the contract carrier might choose his customers and operate under infrequent schedules, whereas the facilities of the common carrier were required to be kept open for all. It may be fairly inferred from the decision that the contract carrier in the Papetti Case was operating in competition with common carriers and performing substantially the same services. In any event, the Court made no distinction between a contract carrier and a common carrier and it is not apparent that there was any contention that the contract carrier was not operating in competition with common carriers. The gist of the opinion was a denunciation of

discrimination in rates in so far as shippers or the public in general was concerned. It has heretofore been demonstrated in the case at bar that this element of discrimination towards the public in the matter of rates is not involved in the case at bar. Furthermore, the Massachusetts law expressly required the contract carrier to collect the exact rate, no more and no less, specified in its filed schedule. As has heretofore been pointed out, the Texas Act does not require the contract carrier to collect a minimum rate and there is no prohibition against the charging of a rate higher than the minimum rate. In Texas the failure to observe the minimum rates, where authorized to be fixed, is simply made a penal offense and the State may institute suit for penalties against any person violating or procuring the violation of any order or rule of the Commission, or suits in equity may be brought on behalf of the State to enjoin such violations. Art. 1690b, Penal Code, Texas. It is significant that the Texas legislature failed to declare void contracts of a contract carrier providing for a rate less than prescribed by the Commission. The Papetti Case therefore is based upon distinguishing and material features not present in the case at bar in that the contract carrier in Massachusetts is placed in the same category as a common carrier in the matter of rates; is required to file with the Department of Public Utilities a schedule of rates; is required to collect the exact rate specified in the schedule filed; is subject to a legislative enactment prohibiting any discrimination in rates, and because the facts in that case indicated no difference in the services rendered by the contract carrier involved

from that of common carriers, the facts and the law involved clearly distinguish the Papetti Case from the case at bar.

The case of *Arctic Roofings* v. *Travers*, 32 Atl. (2d) 559 (Supreme Court of Delaware), involved rates of a common carrier by motor under the federal Motor Carrier Act and is clearly not in point. In all material respects the federal Motor Carrier Act is similar to the federal act relating to rail carriers. One of its prime purposes is to prevent direct or indirect discrimination in transportation rates. The rates of a common carrier transporting for the public were involved and upon the basis of holdings in rail cases it was held that a common carrier could not be estopped from collecting the rates prescribed by tariffs filed with the Interstate Commerce Commission.

Bottemueller v. *Wilson & Co.*, by the District Court for the Western District of Missouri, 57 Fed. Supp. 766, involved rates of a contract carrier operating under the federal Motor Carrier Act. It was held that the published rates filed by the carrier with the Commission superseded the contractual rate. The federal Motor Carrier Act, Title 49, Section 318, USCA, expressly requires a contract carrier operating under the federal Act to file with the Interstate Commerce Commission tariffs setting forth the rates and charges to be filed. The tariffs are required to be open for public inspection and the carrier is expressly required to charge and collect the rates specified in the tariff. Under the federal Act a contract carrier may and frequently does haul under contract for numerous shippers.

There was necessarily involved the controlling question of discrimination not here present. The situation in the Bottemueller Case is entirely different from that here involved.

There is no showing in the opinion in *Gardner* v. *Rich Mfg. Co.* (District Court of Appeals, California), 158 Pac. 23, that the contract carrier there concerned hauled exclusively for the same contractee. In fact, the contrary seems to appear. The question of discrimination was directly involved.

The Circuit Court of Appeals correctly held that cases involving freight rates of rail carriers — interstate under the federal Act and intrastate under the Texas Act — have no application here. The interest of the public in such rates is clear. The acts expressly required such rates to be observed by shipper and carrier. Under the Texas Act relating to rail carriers, the rates prescribed by the Commission are conclusive in all actions between shipper and carrier (Article 6452). Similar requirements are made in the federal Act relating to both carriers by rail and carriers by motor.

Discrimination is not here involved. Injurious competion to common carriers is not here involved. Safety of the highways is not here involved. Public policy of the State does not require petitioner to collect the alleged rates prescribed by the Railroad Commission in the interest of the public. If there has been a violation of any valid order of the Commission, certainly the remedies prescribed by the Act itself are amply sufficient to protect the State.

American National Insurance Co. v. *Tabor*, 230 S. W. 397, 399. We quote from the Tabor Case:

> "The statute does not denounce as void any policy which violates its terms. The expressly declared consequences of infractions of the statute appear to be ample to secure its obedient observance. The Supreme Court of the United States was of the opinion that, where this was true, it was the reasonable implication that the Legislature meant for only the statutory remedies to be applied, and it did not mean for courts to refuse to enforce contracts which were not declared void or unenforceable, though in contravention of the statute. *Harris* v. *Runnels*, 12 How. 79, 13 L. Ed. 901."

The Railroad Commission of Texas has not complained and is not here complaining. It must be presumed that the Commission is and has been fully informed of the compensation paid petitioner by respondent. Under Section 13b of the Act it is made the duty of the Commission to require reports to be filed by each motor carrier with the Commission of all operations under the Act. The Commission, under Section 14 of the Motor Carrier Act, is permitted to hear complaints, require production of records, and subpœna witnesses, to determine if any motor carrier is violating any provisions of the Act or any order of the Commission. No criminal complaints have been filed against petitioner. No suit for penalty has been filed. No equitable action to restrain violations of the Commission's order has been filed. All of these remedial rights are afforded the State under the Act. Article 1690b, Penal Code of Texas.

On the other hand, petitioner is here seeking to recover on the basis of his own wrong. The Attorney General of Texas appears as *amicus curiæ* for the purpose of assisting petitioner to recover for his own benefit, not for the use and benefit of the State. A denial of a recovery here is more conducive to discourage rather than encourage future violations of the Act and orders of the Commission. If a recovery is permitted then an unscrupulous contract carrier may, with impunity, solicit the business of a shipper upon representations that the services to be performed do not come under the purview of the rate making orders of the Commission, perform such services, collect the contractual rate; and after the termination of the agreement, change his front and demand the collection of the legal rate. This is precisely what was done here. It is fairly inferable from this record that had petitioner and his counsel not so urgently insisted that the Railroad Commission rates were not applicable and that the Commission was without power to prescribe rates for services such as those to be performed by petitioner, respondent would have continued, as it had done in the past, to transport the class of merchandise involved in its own trucks operated by its own drivers.

If a recovery is permitted here, an unscrupulous contract carrier may underbid a legitimate carrier and then nevertheless, after the contract is completed, recover the same charges as those bid by his competitor. On the other hand, if a recovery is denied, unscrupulous contract carriers will be discouraged from attempting such acts as it is manifest petitioner was guilty of committing in this

case. The public interest will be better subserved in denying a recovery here than by permitting it, for the very pointed reasons stated by one of the Texas appellate courts in the case of *Wright* v. *Wight & Wight*, 229 S. W. 881, from which we quote:

> "If it be conceded that the transaction in question violated the law mentioned (although we regard it as debatable), yet the appellees were parties thereto and transgressors of section 22 of the same act (article 4896), which made it unlawful for any agent 'to grant or contract for * * * any position or any valuable consideration or any inducement not specified in the policy contract of insurance.' Under section 22, any one so offending is declared guilty of unjust discrimination. So all of the parties are in *pari delicto* in an unlawful agreement which the pleading and agreed facts discloses has been fully executed. This being true, the courts will leave the parties where it finds them. They will extend no aid to recover back money paid under such an illegal and forbidden contract. *Seeligson* v. *Lewis*, 65 Tex. 217, 57 Am. Rep. 593; *Robertson* v. *Marsh*, 42 Tex. 151; *Glenn* v. *Matheus*, 44 Tex. 405."

In answer to the contention that public policy requires a recovery, the Court further said:

> "Appellees say, however, they should be allowed to recover because the public interest will be better promoted by granting than by denying them relief. It is true that as between parties in *pari delicto* relief will be granted if public policy demands it. In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public; the guilty party to whom relief is granted being only the instrument by which the public is,

served. The relief is granted to discourage such transactions by others.

"But, we think, the public interest will be just as well served by denying a recovery to the appellees as it would be by granting such recovery and imposing the loss upon the appellants. Insurance agents will be discouraged from making and carrying out discriminatory agreements when they know that the courts will not allow them to recover back money which they have expended in pursuance of such forbidden contracts."

Furthermore, it should be emphasized that the Circuit Court of Appeals did *not* hold, nor can it be possibly inferred that the Court held, that the rule of *pari delicto* could be asserted to bar recovery by a *common* carrier of lawfully prescribed tariffs.

The Texas cases of *Herrin Transportation Co.* v. *Marion*, 113 S. W. (2d) 291; *Central Freight Lines, Inc.*, v. *C. & S. Motor Freight Lines*, 125 S. W. (2d) 615; and *Railroad Commission of Texas, et al.* v. *Interstate Motor Freight Lines, Inc.*, 77 S. W. (2d) 1100; have no relation to the question here involved.

The Herrin Transportation Co. Case involved a *common carrier* operating under a certificate of convenience and necessity. The common carrier filed tariffs with the Railroad Commission and thereafter made a contract with the shipper to transport commodities at a lesser rate. The shipper undertook to enforce the transportation agreement and to recover damages because the rate charged by the carrier was in excess of the contract rate. The Court

merely held that the rates fixed by the Commission controlled and that damages could not be recovered against the common carrier growing out of a breach of a contract to transport the commodities at a rate less than the Commission rates.

Central Freight Lines, Inc., v. *C. & S. Motor Freight Lines, supra,* involved a controversy between common carriers. One sold its certificate of convenience and necessity to another under a verbal agreement that the purchaser should forego certain pickup privileges afforded under the certificate. The Railroad Commission approved the sale of the certificate but the restrictive agreement was not submitted to nor approved by the Commission. The seller undertook in an equitable action for injunction to enforce the parol agreement and enjoin the purchaser from exercising the pickup privileges. It was held that injunction would not lie to enforce an illegal executory contract.

In *Railroad Commission* v. *Interstate Motor Freight Lines, supra,* a contract motor carrier in a collateral proceeding assailed the action of the Railroad Commission in refusing it a permit to operate on a designated highway and sought an injunction preventing the Commission from interfering with the carrier's operation on the highway in question. Rates and charges were not involved. The Court properly held it was within the jurisdiction of the Commission to determine the highways over which the permit was applicable and that the action of the Commission could only be reviewed in a direct proceeding.

There is nothing in any of the Texas cases cited supporting either the position of petitioner or that of the Attorney General of Texas.

The Circuit Court noted many of the special conditions applying to and distinguishing this case by reason of the facts, and after considering the brief of the Attorney General submitted in support of the petition for rehearing below, pointed out that there was no question in this case of rate discrimination, in so far as the public was concerned and that there was no rate discrimination in so far as any common carrier was concerned nor any effect upon the business of common carriers because petitioner could only render service to respondent and could not solicit or engage in business generally.

Under these circumstances we submit the Circuit Court of Appeals was correct in holding there is no question of general public interest involved in this case and no public policy requiring that petitioner recover.

IV. ALTERNATE POINTS PRESENTING ADDITIONAL GROUNDS UPON WHICH THE JUDGMENT OF THE COURT BELOW MAY BE SUSTAINED

1.

The Railroad Commission of Texas did not undertake to apply minimum rates and charges to the transportation services here involved.

2.

If the orders of and permit issued by the Commission be construed as applying the rates set forth in the tariff relied upon by petitioner as minimum rates for the transportation services here involved, then such orders, permit and tariff to this extent are void on their faces because the Commission failed to find, as it was required to do, as a prerequisite to exercising limited and conditional ratemaking powers that the proposed operations of petitioner were in competition with the operations of common carriers over the highways of the state and that the services performed or to be performed by petitioner were substantially the same as those performed by common carriers.

3.

The Railroad Commission was without power to fix rates or charges for the transportation services rendered by petitioner because the evidence showed and the jury in the trial court found that the operations of petitioner over the highways of Texas were not in competition with common carriers and the services performed by him were not substantially the same as those performed by common carriers.

4.

If the laws of Texas be construed as authorizing the Railroad Commission to fix minimum rates and charges applicable to private contracts of carriage, even though the operations of private carriers are not in competition with common carriers over the public highways, and even

though the services performed by private contract carriers are not substantially the same as those performed by common carriers, then the legislative enactment and the orders and acts of the Commission thereunder, as attempted to be applied to respondent here, violate respondent's freedom of contract and deprive respondent of its property without due process of law, all in violation of the rights guaranteed respondent under the Fifth Amendment and Section I of the Fourteenth Amendment to the Constitution of the United States.

5.

If Article 911b, Revised Statutes of Texas, and the various sections thereof, be construed as authorizing the Commission to fix rates and charges to be observed as a minimum by private contract carriers, such as was petitioner, without at the same time requiring the Commission to find the existence of facts sufficient to authorize the Commission to fix minimum rates under Section 6-aa of the Statute, then so much of said legislative enactment of the State of Texas is violative of the Fourteenth Amendment to the Constitution of the United States.

Brief of Argument

All of the above propositions of law were urged by respondent in the trial court. The ruling of the trial court thereon was adverse to respondent. The ruling of the trial court thereon was properly assigned as error in the Court below by appropriate specifications of error. These speci-

fications of error were disposed of by the Court below in the following language:

> "We will not enter into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier without first determining whether or not it was in competition with, and performing services substantially similar to, a common carrier, nor the related question as to whether Section 6-aa, without making same applicable to contract carriers in competition with common carriers, is unconstitutional and void, for we agree with Appellee that the supplemental contract to pay rates less than those provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him."

Had the Court below sustained the specifications involving the alternate points here presented, the same judgment as entered by that Court would have necessarily followed. The alternate points are not here presented to overthrow the judgment of the Court below but to sustain such judgment. They present additional grounds why such judgment should be sustained. Respondent has the right to here present such alternate points and if this Court finds any or all of such points to be well taken, the petition for *certiorari* should be dismissed or denied, even though this Court might conclude that the Court below improperly decided the law question upon which that Court based its judgment. *Langnes* v. *Green*, 282 U. S. 531, 535, 536, 537, 539, 75 L. Ed. 520; *Story Parchment Co.* v. *Patterson Parchment Paper Co., et al.*, 282 U. S. 555, 560; *Morley*

Construction Co. v. *Maryland Casualty Co.*; 300 U. S. 185, 190, 191, 81 L. Ed. 593.

For convenience and reference, further argument will be divided into sections, without reference, however, to the numbers assigned the different alternate points.

1. The alternate points do not present a collateral attack upon an order of a legally constituted state board entered pursuant to its lawful authority. They do not present a question of improper exercise of power so as to invoke the collateral attack rule such as was involved in *Texas Steel Co.* v. *Fort Worth & D. C. Ry. Co.*, 40 S. W. (2d) 78 (Tex. Com. App.), and *Alpha Petroleum Co.* v. *Terrell*, 59 S. W. (2d) 364 (Tex. Com. App.). On the other hand, the alternate points challenge the *inherent* power of the Railroad Commission of Texas to fix *any* rates or charges applicable to the transportation here involved, the Commission exercising under the Texas statute only conditional and limited ratemaking power, as distinguished from unconditional and general power in the premises. The power of a state commission must be measured by the legislative act conferring such power, whether the power sought to be exercised is legislative, judicial or administrative. The state agency must find, or at least it must otherwise appear in the record, that the prerequisite facts authorizing the exercise of conditional power exist before a court will enforce an order of the state commission. The existence of *power*, as distinguished from the method of *exercising* such power, is always the subject of judicial inquiry. The rule of verity has no application.

Cline v. *Niblo et al.*, 8 S. W. (2d) 633 (Tex. Sup. Ct.); *Cunningham* v. *Robison* (Sup. Ct.) 136 S. W. 441; *State Line Consolidated School District* v. *Farwell Independent School District*, 48 S. W. (2d) 616 (Tex. Com. App.); *Geffert* v. *Yorktown Independent School District*, 290 S. W. 1083; *Willis* v. *First Real Estate & Inv. Co. et al.*, 68 Fed. (2d) 671, 675; *Wichita R. R. & Light Co.* v. *Public Utilities Commission of Kansas*, 260 U. S. 48, 67 L. Ed. 124.

A commission or court must not only have jurisdiction over the parties and subject matter, but power to award the particular relief undertaken to be granted. *Harrison* v. *Barngrover*, 72 S. W. (2d) 971 (Texas C. C. A., writ denied, Texas Sup. Ct.); *Smith et al.* v. *Paschal et al.*, 1 S. W. (2d) 1086 (Tex. Com. App.); *Cooper* v. *Reynolds*, 10 Wall 308, 19 L. Ed. 931.

2. The validity or constitutionality of the Texas Motor Carrier Act as a whole, or any part thereof, is not here attacked, except and unless a construction be placed upon Section 6-aa thereof obviously different from the intended meaning of the Legislature of Texas. The alternate points do not in any respect require a holding by this Court different from the previous holding in *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. Ed. 288. On the other hand, the holding of this Court in *Stephenson* v. *Binford*, *supra*, is sought here to be applied. The legality of the act of the Commission in issuing a permit to petitioner (except insofar as it is claimed that such permit fixes minimum rates to be charged) is not here questioned. It is conceded that a permit is required under the Act by every

motor carrier for hire, whether common carrier or private carrier. It is also conceded that the purpose of the Act under which the permit was granted was to protect the safety and convenience of the public in the use of the highways and to preserve the highways for the general welfare, and to protect common carriers against destructive, unfair and discriminatory competition by other motor carriers in the use of the highways. *Texas & Pacific Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927 (930, 931). To this end it was proper that the Commission require petitioner to apply for and obtain a permit, post a bond, not overload, and otherwise comply with the rules and regulations of the Commission designed to protect the public welfare. It is also conceded that had petitioner's operations been in competition with the operations of common carriers over the highways of the state, and had petitioner performed substantially the same services as common carriers, and had the Commission so found, the Commission could have fixed minimum rates to be observed by petitioner in order to protect the interests of common carriers. But this is a far cry from fixing rates covering private transportation over the public highways where the interests of common carriers are not concerned. The order of the Commission relied upon by opposing counsel expressly found that petitioner's use of the highways would not be injurious to the public and would not impair the public service of any authorized common carriers. Absent a legitimate public interest, the Legislature of Texas was not authorized to empower the Commission to fix rates for private transportation over the highways of the state nor was the Commission

authorized to exercise such power, if any was given. *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264; *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101.

The Legislature of Texas in enacting the present Motor Carrier Act in 1931, Article 911b, Revised Statutes of Texas, and the subsequent amendments thereto, recognized its limitations and applied separate rules and regulations for common and contract carriers. *Stephenson* v. *Binford*, 287 U. S. 251, 269, 77 L. Ed. 288. All private carriers are classified and included within the definition of contract carriers [*T. & P. Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 930] for the purpose of requiring such contract carriers to obtain a permit and to observe the rules and regulations of the Commission designed to protect the safety and convenience of the public in the use of the highways and to preserve the highways, but not for ratemaking purposes [*T. & P. Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 930].

The Texas Legislature only undertook to authorize the Commission to prescribe minimum rates, fares and charges for such contract carriers who operate in competition with common carriers, and then the minimum rates charged must not be lower than those prescribed for common carriers for substantially the same service. Section 6-aa, Article 911b, Revised Statutes of Texas; *T. & P. Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 930;† *Stephenson* v. *Binford*, 287 U. S. 251, 273, 274, 77 L. Ed. 288.

†The Attorney General in his amicus curiae brief relies upon Texas & Pacific Ry. Co. v. Railroad Commission, supra, as announcing the public policy of the State with respect to motor carriers.

Speaking of the meaning of Section 6-aa, the Texas Court of Civil Appeals in *T. & P. Railway Co.* v. *Railroad Commission, supra* (930) said:

> "Contract carriers, a distinct and separate class from common carriers, must obtain a 'permit' to operate as such. Sec. 6 prescribes the requisites of an application therefor and Sub. (3) (c) of that Section forbids the granting of such permit if operation thereunder 'will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory.' And where authorized contract carriers operate in competition with common carriers the Commission must prescribe minimum rates, fares and charges for such services which must not be lower than those prescribed for common carriers for substantially the same service. See Sec. 6-aa."

Section 6-aa of the Act itself† is too clear and unambiguous to require construction. Obviously, it means what the Texas Court said it meant in *T. & P. Ry. Co.* v. *Railroad Commission, supra,* and what this Court said it meant in *Stephenson* v. *Binford, supra.* This section prescribes the power, sets forth the condition upon which it may be exercised, and the measure of its use. The Railroad Commission of Texas does not exercise constitutional power over motor carriers. It only exercises such power

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†"The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service." Section 6-aa, Article 911b.

as the Legislature chose to delegate. The delegated power may be only exercised upon certain conditions. Minimum rates may not be fixed for all private or contract carriers. Those private carriers who do not operate in competition with common carriers over the highways of the state are beyond the ratemaking jurisdiction of the Commission; this because the operations of such private carriers do not compete with common carriers and therefore of necessity do not constitute unfair, discriminatory or destructive competition to common carriers such as the Legislature of Texas intended to prevent by the enactment of Section 6-aa. *T. & P. Ry. Co.* v. *Railroad Commission,* 138 S. W. (2d) 927, 930, 931.

The first enactment of the Texas Legislature in 1929 undertook to convert all private carriers into common carriers [*T. & P. Ry. Co.* v. *Railroad Commission,* 138 S. W. (2d) 927, 929 and 930] but in the 1931 enactment (911b) repealing the 1929 enactment, the Texas Legislature dealt separately with contract and common carriers and confined the ratemaking powers of the Commission over contract carriers to a narrow, limited and conditional field. This was doubtless due to the holdings of this Court in *Frost* v. *Railroad Commission,* 271 U. S. 583, 70 L. Ed. 1101, and *Smith* v. *Cahoon,* 283 U. S. 553, 75 L. Ed. 1264. On the other hand, the Legislature conferred, as it was authorized to do, unlimited and unconditional power upon the Commission to fix and regulate rates, charges and fares of common carriers in order to prevent discrimination. No discrimination can be involved, as held by the Court below, where a contract carrier hauls for and is

only authorized to haul for one contractee, as was the case of petitioner. Petitioner could have applied for a contract carrier's permit to haul for whomever he might wish and his services, had he been granted such a permit, would have been available to anyone he might choose. *T. & P. Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 931. But such an application was not made and such a permit was not granted. The order of the Commission granting the permit (R. 125-129) and the permit itself (R. 130-132) required petitioner to haul exclusively for respondent. If petitioner had applied for and obtained a permit to haul for anyone who would employ him, and so conducted his operations as to compete with common carriers over the highways of the state, the Commission, under the legislative enactment, would have been justified in fixing minimum rates, not less than those prescribed for common carriers for substantially the same services and required petitioner to observe such minimum rates. But such was not the case here.

There is no finding of the Commission that petitioner's proposed operations were or would be competitive with the operations of common carriers over the highways of the state or that the services performed or to be performed by him are or were substantially the same as those performed by common carriers. The permit is silent with respect to these elements (R. 130-132). The order finds facts inconsistent with the existence of competition or similarity of service (R. 124-129). The evidence upon the trial showed and the jury found that the operations of

petitioner were not in competition with common carriers over the highways of the state and that the services performed by him were not substantially the same as those performed by common carriers (R. 105). The trial court did not set the special verdict of the jury aside. On the other hand, the trial court permitted the special verdict of the jury to stand and rendered judgment notwithstanding the verdict (R. 104-107).

3. The rates sought to be applied here are those prescribed in Texas Motor Freight Class and Commodity Tariff No. 1-A, which tariff was promulgated by the Commission primarily for common carriers. This tariff superseded Tariff No. 1. By general order entered on August 22, 1931 (following the promulgation of Tariff No. 1), the Commission directed that:

> "All Contract Motor Carriers as hereinbefore defined, be and they are hereby ordered to observe and apply as minimum temporarily until further orders of this Commission, * * * the rates, rating, rules and regulations heretofore prescribed or approved by this Commission for observance by Class 'A' Motor Carriers, as shown in Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1, as amended." (R. 134).

Subsequently the Railroad Commission of Texas adopted Motor Freight Class and Commodity Tariff No. 1-A, which became effective June 26, 1940. Section 3 of this tariff provides for the application of the rates therein set forth. Item 470 prescribes that the rates, rules and regulations in the tariff shall be observed "by Contract

Motor Carriers as minimum, on Texas Intrastate Traffic, unless permits issued by the Commission provided to the contrary" (R. 136-137).

It is the position of counsel for petitioner that because the permit issued to Steele (R. 130-132) did not provide that the rates prescribed in Tariff 1-A should not apply, that such rates so prescribed automatically were applicable. It is also counsel's position that the reference contained in the order of the Commission (R. 127) as follows:

> "In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rate prescribed for common carrier motor carriers",

constitutes an order directly applying the tariff rates relied upon to the transportation services here involved. We submit these contentions are untenable. Tariff 1-A, prescribing rates for common carriers, is not applicable because the service performed by petitioner under the evidence and the special verdict was not substantially the same as the services performed by common carriers. Hence the tariff prescribes a rate for a different kind and character of service than that performed by petitioner. The Commission was without power under the legislative grant of authority to fix a blanket minimum rate applicable to all contract carriers. It was necessary for the Commission to consider each application for a permit on its own merits, to determine if the proposed operations thereunder were competitive with common carriers, and if the services to be performed were substantially the same as those per-

formed by common carriers. Therefore it must of necessity be presumed that the Commission, in the rules set forth in Item 470, Section 3, Tariff 1-A, of date June 26, 1940, intended that the tariff should be observed by contract carriers as a minimum when such contract carriers operated in competition with common carriers and performed substantially the same service. It cannot be assumed that the Commission intended to exceed its authorized statutory powers and violate statutory directions. The provision in the general order of August 22, 1931, cannot be construed as applying Tariff No. 1-A, effective June 26, 1940, to the operations here involved, because the order of August 22, 1931, related to Tariff No. 1, which was superseded by Tariff 1-A. The reference in the order (R. 127) is insufficient of itself to constitute an order making the tariff applicable. This reference must be considered in connection with the tariff itself and evidences only the attitude of the Commission if the operations become competitive with common carriers and the services performed are substantially the same as those performed by common carriers. In other words, the Commission pointed out a guide to petitioner in event the contingency mentioned should arise during the course of operations. The jury found neither contingency arose. It must be further remembered that Tariff 1-A, and the rules and regulations therein set forth, were in effect long before the execution of the original or supplemental agreement here involved. The permit was issued and the order of the Commission (R. 124-127) was entered prior to the execution of the supplemental agreement (R. 208-211). In

this contract, it was specifically agreed by the parties that the Railroad Commission of Texas had not fixed any rates, charges or tariffs for the kind and character of service to be rendered by petitioner for respondent. It is inconceivable how petitioner's counsel can now contend that the Railroad Commission of Texas did in fact fix rates when, subsequent to the permit and order now relied upon, and with full knowledge thereof, petitioner in writing agreed that no rates, charges or tariffs were prescribed for the services to be rendered by petitioner. It is submitted that the record in this case wholly fails to disclose that the tariff relied upon by petitioner was ever made applicable by the Commission to the transportation services involved. On the other hand, the Record affirmatively discloses to the contrary. Petitioner having been fully paid in accordance with the terms of his contract, the judgment of the Circuit Court of Appeals is correct.

4. If it be assumed that the Commission undertook to make Tariff 1-A applicable to the services performed by petitioner, the action of the Commission is void. The provision with respect to application of rates contained in Tariff 1-A, effective June 26, 1940, if construed as an order applying such tariff to the transportation services involved, is void on its face because the order was entered long before petitioner's application was filed and is a general order applicable to all contract carriers, without reference to the character of operations to be conducted or services to be performed. It was never contemplated by the Legislature of Texas under Article 911b that such an order would comply with the requirements of this Act. Further-

more, in no event is the tariff effective until the permit is issued, for the permit might well provide otherwise with respect to rates. If, as contended by petitioner, the failure of the permit to make other provisions with respect to rates and the reference to the tariff contained in the order constitute an effort on the part of the Commission to apply the tariff rates to the services to be performed by petitioner under the permit, the permit and the order are each void on their faces to the extent that either of them constitutes a ratemaking order because of the failure of the Commission to find there, or elsewhere in the Record, that the operations of petitioner under the permit are competitive or will be competitive with common carriers over the highways of the state, and that the services performed or to be performed by him will be substantially the same as those performed by common carriers. Where a commission exercises only limited and conditional power over a given subject, it is necessary that the Commission expressly find facts justifying the use of such power. The existence of jurisdictional facts is not presumed merely from the act itself. *Cunningham* v. *Robison*, 136 S. W. 441; *Geffert* v. *Yorktown Ind. School District*, 290 S. W. 1083; *Willis* v. *First Real Estate & Inv. Co. et al.*, 68 Fed. (2d) 671; *Cline* v. *Niblo*, 117 Texas 474, 8 S. W. (2d) 633; *State Line Consolidated School District* v. *Farwell Independent School District*, 48 S. W. (2d) 616; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446. Even if a commission exercises general and unconditional power, findings of fact justifying the exercise of such power must be made where the act authorizing the use of power requires such findings.

Wichita R. R. & Light Co. v. *Public Utilities Commission of Kansas*, 260 U. S. 48, 58, 59, 67 L. Ed. 124.

Article 911b, Section 12a, expressly requires the Commission, along with its order, to file a "concise written opinion, setting forth the facts and grounds for its action," in all instances where the application is contested. The Record conclusively discloses that the application of petitioner for a permit was a contested application. See statement from Record found in respondent's brief (Brief for Appellant in Court below, pages 36 to 39). So if upon the contested application the Commission did in fact undertake to fix rates, it was required under the express provisions of the Act to file findings justifying its action. The Commission did render an opinion and make findings (R. 125-130), but there is no finding justifying the Commission in fixing rates. On the other hand, the facts found are to the contrary. So, regardless of the nature of the power conferred upon the Commission, its ratemaking order (if construed as such) is void on its face because of the lack of necessary findings. Also see *T. & P. Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 932. But here it conclusively appears from the legislative enactment itself that the Commission exercised only conditional and limited power over contract carrier rates. Therefore, even without statutory requirements, it must appear from the order of the Commission that the prerequisite facts justifying ratemaking powers exist. Otherwise the order is void on its face.

5. In cases where a legislative agency is clothed with

limited legislative power and the order of the agency is silent with respect to the existence of facts justifying the use of the power, it is always a subject of judicial inquiry to determine if the prerequisite facts exist. Such an inquiry does not violate the collateral attack rule under the authorities previously cited. The trial court permitted evidence with respect to whether petitioner's operations were in competition with the operations of common carriers over the highways of the state and with respect to whether the services performed by petitioner were substantially the same as those performed by common carriers. The orders of and proceedings before the Commission introduced in evidence, construed most favorably to petitioner, were silent upon these two issues of fact inquired into by the trial court. The trial court submitted both issues of fact to the jury and the jury by special verdict found that petitioner's operations were not competitive with common carriers and that the services performed by him were not substantially similar to those performed by common carriers. The findings of the jury were not set aside by the trial court but were expressly allowed to stand as the special verdict of the jury. Judgment was rendered by the trial court in favor of petitioner, notwithstanding the verdict. This judgment was reversed by the Court below with instructions to the trial court to enter judgment for respondent. The special verdict of the jury and the Record in this case sustain the judgment of the Circuit Court of Appeals, for under the Record and the verdict of the jury on the fact issues the rate-making orders, if construed as such by the Commission,

were void for want of inherent power. *Cline* v. *Niblo*, 117 Texas 474, 8 S. W. (2d) 633, by the Supreme Court of Texas, is in point. The Constitution of Texas confers upon the county courts exclusive original jurisdiction over estates of deceased persons. The effect of the constitutional provision is to confer upon county courts the general power to administer the probate law in accordance with legislative enactments. The homestead of a deceased person may not be sold to satisfy creditors of the deceased if a widow or minor child survives. In the cited case of *Cline* v. *Niblo*, the County Court, in the exercise of its probate jurisdiction, entered an order directing the sale of certain property for the purpose of satisfying claims of creditors which had been allowed by the Probate Court. The order of the Probate Court was silent with respect to whether the property was the homestead of the deceased and with respect to whether minor children survived. A direct appeal was not taken to the District Court as authorized by the Texas probate laws. The property was sold pursuant to the order of the Probate Court and purchased by Cline for value. Thereafter the purchaser's title was attacked in a separate proceeding by the heirs of the deceased. The question was squarely presented to the Supreme Court of Texas whether in a collateral proceeding the court was warranted in determining if the real estate was the homestead of the deceased, if minor children or an unmarried daughter survived the deceased, and if facts existed justifying the Probate Court to order the sale of the homestead. The Record in the Probate Court was

silent with respect to these elements. The Supreme Court answered this question in the following language:

> "If the probate records show that the court has attempted to exercise a power which it does not have, the judgment is void on its face, amounts to nothing, and may be disregarded in any forum. Freeman on Judgments (5th Ed.) pars. 382, 395. In cases, however, where the vice in the decree does not appear on its face, and the judgment does not show that the homestead question has been adjudicated, the courts permit the true facts to be shown and the invalidity of the decree to be established *aliunde* the record.
>
> "This is not so much a collateral attack on the judgment of the probate court as it is a declination on the part of the courts to conclusively presume that the homestead question has been determined in the probate proceedings, unless it so appears affirmatively from the record. If the record shows that the questions whether or not the property was homestead, or that the debts involved were chargeable against a homestead, then these issues, other requisites being present, are foreclosed, except upon direct attack upon justiciable grounds. Freeman on Judgments (5th Ed.), pars. 350, 372, 378, 379. But if these questions do not appear to have been adjudicated, the conclusive presumption of their involvement and determination does not obtain, and the real facts may be shown in another forum. This rule of law rests upon a sound basis."

The decision of the Supreme Court is grounded upon the rule that even though a court may have jurisdiction over the parties and the property, such court must also have the power to enter the kind of order, judgment or decree that was entered.

A very similar question was decided by the Commisssion of Appeals of Texas, acting for the Supreme Court, in the case of *State Line Consolidated School District* v. *Farwell Independent School District*, 48 S. W. (2d) 616, from which we quote:

> "It is true that our laws provide in certain instances that the orders and proceedings of county school boards can only be questioned by appeal to higher school authorities, but, when a school board acts without authority of law and contrary to express statute, and in such a manner that its act is void, then the courts of the land may be appealed to directly without first exhausting the remedy of appeal through the school authorities. *County School Trustees of Jackson County* v. *Edna Independent School District* (Tex. Com. App.), 34 S. W. (2d) 860; *Brockman* v. *Echols* (Tex. Civ. App.), 22 S. W. (2d) 686; *Collin County School Trustees* v. *Stiff* (Tex. Civ. App.) 190 S. W. 216 (writ ref.); *Freeport Independent School District* v. *Common School District*, 115 Tex. 133, 277 S. W. 97; *Henderson* v. *Miller* (Tex. Civ. App.) 286 S. W. 501 (writ ref.).
>
> *"In connection with the above, we hold that the county board of trustees is an administrative body with certain defined powers and duties. It can only exercise such powers and perform such duties as are expressly defined by statute, or necessarily implied therefrom. As long as such board acts within lawful limitations its judgment and discretion can only be questioned by appeal to higher school authorities, but, when it goes outside its statutory limitations and acts without authority of law, its acts are void and may be questioned in a court action without the formality of an appeal to the higher school authorities."*

The laws of Texas confer upon District Courts the power to remove disabilities of minority where the minor resides in the county of the District in which the petition is presented and where he is over 19 years of age. The jurisdiction of the District Court is thus limited and conditional. The Supreme Court of Texas, in *Cunningham* v. *Robison*, 136 S. W. 441, held that an order of the District Court undertaking to remove disabilities of a minor was void where it failed to appear from the order or from the record that the minor resided in the county where the petition was presented and was over 19 years of age. The Court held the order was subject to a collateral attack in another proceeding and was not (p. 441) entitled to the presumption of verity, especially as to the jurisdiction of the court, as would be the case where the function performed was that of the ordinary judicial powers of the court. The Commission of Appeals of Texas in another case, *Geffert* v. *Yorktown Independent School District*, 290 S. W. 1083, referring to the taxing power of a school district, held:

> "In a case like this of limited jurisdiction, where the right of the tribunal to proceed at all depends upon the existence of a given fact or the doing of a specific act, such fact or act is jurisdictional and precludes any further proceeding until it is shown to exist or to have been performed, as the case may be. The proceedings of such special tribunals, like inferior courts not of general jurisdiction, are not entitled to the presumptions of regularity usually attaching to official acts, until their jurisdiction — their right to act at all — is first affirmatively shown."

and also:

"It will not do to say that this precedent fact necessary to give jurisdiction may be shown by the subsequent acts of the tribunal in harmony with its existence, since this would be to attach to such subsequent proceedings the quality of official acts and the consequent force of evidence by way of raising a presumption of authority or power. *Such authority — in other words, jurisdiction — cannot be presumed from anything. It must be proved as any other fact is proved."*

Anderson, Clayton & Co. v. *Allred*, 62 S. W. (2d) 107 (Tex. Com. App.), involved the Texas Motor Carrier Act. The Railroad Commission was attempting to regulate trucks of Anderson, Clayton & Company under the provisions of the Act. It was held that the court in a collateral proceeding could determine if the operations of Anderson, Clayton & Company came within the legislative definition of contract carriers for hire so as to be subject to the provisions of the Texas Motor Carrier Act.

It has been held by this Court, in cases arising under the full faith and credit clause of the federal Constitution, that it is always proper for a court in another state to inquire into the power or jurisdiction of the court of a sister state to render the judgment sought to be enforced. *Cole* v. *Cunningham*, 133 U. S. 107, 33 L. Ed. 538.

Section 20 of the Texas Motor Carrier Act, Article 911b, permitting appeals from orders of the Commission to the District Court of Travis County, does not preclude a court in another proceeding where the order of the Commission is sought to be enforced, to inquire into the inherent

power of the Commission to enter the order. Where, as here, the Commission exercises only limited and conditional power, and the record of the Commission was silent with respect to the existence of facts justifying the use of such power, it was proper for the trial court to inquire into the existence of such facts. The trial court did so, submitted the issues to the jury, and the jury found the facts did not exist. The attempted ratemaking orders therefore cannot be enforced and the judgment entered by the Court below was proper.

6. Petitioner and the Attorney General of Texas undertake to apply the doctrine laid down by this Court in *Pierce Oil Co.* v. *Phoenix Refining Co.*, 259 U. S. 125, 66 L. Ed. 855; *Shepard* v. *Barron*, 194 U. S. 553, 48 L. Ed. 1115; and *St. Louis Malleable Casting Co.* v. *Pendergrast Construction Co.*, 260 U. S. 469, 67 L. Ed. 351 It is asserted that respondent, a foreign corporation, came into Texas, charged with the knowledge of the Texas laws and the orders of the Railroad Commission, "in the use by respondent of a Texas contract carrier permittee performing transportation services for respondent only." (Attorney General brief, p. 38.) The doctrine has no application here. Respondent came to Texas long before the arrangement with petitioner here involved was made and long before petitioner obtained a permit to operate as a contract carrier and before the orders relied on by petitioner were entered. Respondent was not a party to the proceedings before the Commission. It did not apply for and did not receive any benefits from the Commission. Respondent

was not issued and has never held a contract carrier's permit. The transportation involved here was not performed under any permit issued to respondent. Petitioner's application to the Railroad Commission was for a permit; not to have rates fixed for the services to be performed. Respondent was not a party to and had no knowledge of the contents of petitioner's application for a permit. The applicable law of Texas, Article 911b, Section 6a, did not require petitioner to file with the Commission a schedule of rates to be charged by him. Respondent was not charged with notice of the gratuitous statement in petitioner's application for a permit that petitioner expected to charge the Railroad Commission rates, particularly since the law did not require such statement to be made. The contract of carriage was entered into long after petitioner's application containing such statement was filed. Respondent knew, or was charged with knowledge of, the fact that the Commission could not fix minimum rates in the absence of competition between the contract carrier and common carriers over the highways of Texas, and in the absence of substantial similarity of service between the contract carrier and common carriers. Respondent knew and the parties agreed that neither of these facts existed. Respondent did not know at the time it contracted with petitioner and does not now believe that the Railroad Commission of Texas ever undertook to apply rates to the transportation services here involved. The parties hereto expressly agreed that no such rates were fixed by the Commission. The rule announced in the cited cases has no application.

The mere fact that respondent holds a permit to transact business in the State of Texas does not deprive it of the right to complain of an unlawful order of the Commission or of an unconstitutional act of the State Legislature. *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532, 533, 66 L. Ed. 352; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 544, 66 L. Ed. 1044. The Legislature has not undertaken to impose any such penalty. Furthermore, the Legislature of Texas cannot deprive a court of the United States of its lawful jurisdiction. *Farmers Loan Co.* v. *Reagan*, 154 U. S. 362, 38 L. Ed. 1014; *Terral* v. *Burke Construction Co.*, *supra*.

7. If in fact the Legislature of Texas did confer upon the Railroad Commission general power to fix rates and charges of private carriers (such as was petitioner) who did not operate in competition with common carriers and who did not perform substantially the same services as common carriers, and to require respondent to observe such rates and deprive respondent from entering into a private contract of carriage with petitioner, then the Texas law and the attempted acts of the Commission thereunder are unconstitutional and void under the Fifth and Fourteenth Amendments to the national Constitution, because respondent's freedom of contract is violated and its property is taken without due process of law. *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264; *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101. The doctrine announced in *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. Ed. 288, does not save the act as thus applied from the constitutional

objections here presented because this Court, in *Stephenson* v. *Binford*, assumed that the Commission was only authorized to fix rates for private carriers where the private carriers operated in competition with and performed substantially the same service as common carriers.

8. If the Texas statutes are construed as not requiring the Commission to find the existence of facts prerequisite to the conditional power to fix rates of private carriers, the Texas Act also violates due process of the Federal Constitution. *Panama Refining Co.* v. [illegible], 293 U. S. 388, 79 L. Ed. 446.

CONCLUSION

It is respectfully submitted that the public interest is not involved or adversely affected by the decision of the Court below. The judgment of the Court below was correct. If, as assumed by that Court, the Railroad Commission did fix rates and its acts were lawful under the Texas Act and that the Act is not unconstitutional, then the holding of that Court on the point of law discussed in the opinion is correct. If, on the other hand, the alternate points, or any of them, presented in this reply, are well taken, the correct judgment was entered by the Court below regardless of whether that Court properly decided the legal question made the basis of the judgment.

We agree with this statement found in the opinion of the Court below:

"Surely a Daniel has come to judgment and from what a remarkable source!"

A judgment contrary to that entered by the Court below would be adverse to the public policy of Texas and shocking to morals and good conscience. It is therefore respectfully prayed that the petition for writ of *certiorari* be dismissed or refused.

Respectfully submitted,

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Copies of this brief have been furnished by registered mail to Messrs. Cecil A. Morgan and T. S. Christopher and the firm of Culbertson, Morgan, Christopher & Bailey, attorneys for the petitioner, whose post office addresses are First National Bank Building, Fort Worth, Texas, and to Honorable Grover Sellers, Attorney General of Texas, Honorable James Noel, Assistant Attorney General of Texas, and Honorable Zollie C. Steakley, Jr., Assistant Attorney General of Texas, whose addresses are: The Attorney General of Texas, Capitol Station, Austin, Texas.

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